IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GEORGE SPITTAL, No. CIV.S-05-0112 MCE DAD PS

Plaintiff,

v. FINDINGS AND RECOMMENDATIONS

JERRY HOUSEMAN, et al.,

Defendants.

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This matter is before the court on (1) the motion to dismiss plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (Doc. no. 16) filed on behalf of defendants Jerry Houseman, Roy Grimes, Karen Young, Manny Hernandez, Rick Jennings, Dawn McCoy, Miguel Navarette, Angelle Murry, Francine Dorrough, Candice Ingle and Cindy Wray; and (2) plaintiff's motion for summary judgment (Doc. no. 18). Having considered all written materials submitted in connection with the motions, for the reasons explained below, the undersigned will recommend that defendants' motion to dismiss be granted and plaintiff's motion for summary

judgment be denied. The undersigned will further recommend that plaintiff's amended complaint be dismissed with prejudice and this action be closed.

I. Motion to Dismiss

A. Applicable Legal Standards

A complaint, or portion thereof, should only be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim or claims that would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41 (1957)); Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint. Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976). Furthermore, the court must construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). In a case where the plaintiff is pro se, the court has an obligation to construe the pleadings liberally. Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). However, the court's liberal interpretation of a pro se complaint may not supply essential elements of a claim that are not pled. Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992); Ivey v. Bd. of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

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B. Analysis

As previously observed by the undersigned in findings and recommendations recently filed in two of plaintiff's other lawsuits,[1] this is one of eight actions plaintiff has initiated in this court over the last five years. (See No. CIV.S-00-1287 WBS PAN PS; No. CIV.S-00-1766 LKK GGH PS; No. CIV.S-01-00036 GEB JFM PS; No. CIV.S-04-1198 GEB DAD PS; No. CIV.S-05-0112 MCE DAD PS; No. CIV.S-05-0749 FCD DAD PS; No. CIV.S-05-1157 MCE KJM PS; No. CIV.S-05-2042 FCD GGH PS.[2]) All of the actions arise out of plaintiff's employment as a substitute teacher with the Sacramento City Unified School District ("District"). All of the actions involve allegations that the District and its employees have retaliated against plaintiff for speaking out against District policies regarding classroom management, particularly those policies which plaintiff perceives as being motivated by race, socio-economic factors, or circumstances related to students' behavior. Some of the actions additionally name as defendants the lawyers who have defended the District and its employees against plaintiff's numerous legal actions as well as the judges who have been assigned to preside over those cases. In this regard, plaintiff typically accuses defense counsel and the judges of

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[1] See Spittal v. Shubb, No. CIV.S-05-0749 FCD DAD PS, Findings and Recommendations filed November 2, 2005; and Spittal v. Schenirer, No. CIV.S-04-1198 GEB DAD PS, Findings and Recommendations filed November 8, 2005.

[2] A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). The undersigned hereby takes judicial notice of these court files.

lying, contempt, conspiracy and the like in connection with the litigation of plaintiff's claims.[3]

The named defendants in the instant amended complaint are District Board of Trustees members Jerry Houseman, Roy Grimes, Karen Young, Manny Hernandez, Rick Jennings, Dawn McCoy and Miguel Navarette. District employees Angelle Murry, Francine Dorrough, Candice Ingle and Cindy Wray, all of whom are employed at the District's Marian Anderson Children's Center ("Center"), also are named as defendants. The amended complaint alleges that defendants retaliated against plaintiff after he informed a District co-worker of a previous incident in which a child allegedly was slapped by a teacher at the Center. The amended complaint alleges that defendants retaliated against plaintiff by distributing a letter "that

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[3] Such accusations appear to be routine for plaintiff, a former lawyer whom the Supreme Court of Ohio has permanently disbarred from the practice of law in that state. In 1990, the Supreme Court of Ohio found "the flagrant disrespect that [Mr. Spittal] has demonstrated toward the entire judicial system deserving of the legal profession's most severe sanction." Akron Bar Ass'n v. Spittal, 51 Ohio St. 3d 121, 122, 554 N.E. 2d 1338, 1339 (1990). In disbarring plaintiff, the Supreme Court of Ohio relied on evidence presented to a disciplinary panel which

> established that [Mr. Spittal] routinely, and without justification, referred to the decisions made by federal and Ohio judges as being the product of dishonesty, partiality, ignorance, and incompetence. The evidence further established that [Mr. Spittal] routinely, and without justification, accused judges and attorneys alike of lying. Indeed, the record manifests that [Mr. Spittal] made these remarks simply because he disagreed with a judge's decision or an attorney's argument.

51 Ohio St. 3d at 122, 554 N.E. 2d at 1339.

instructed parents of the children under Mr. Spittal's care to communicate with [defendant head teacher Angelle Murry] if they had any concerns" regarding plaintiff. (Am. Compl. at 6-7.)[4] According to the amended complaint, that letter and its innuendo stigmatized plaintiff by "steering the parents away from discussing their concerns with plaintiff ...." (Id. at 7.) The amended complaint also asserts in a conclusory fashion that plaintiff was subjected to "racially motivated verbal assaults" and that his teaching assignment was ended based on his race. (Id. at 7-8.) Finally, the amended complaint alleges that plaintiff spoke out against that discrimination only to be further stigmatized and retaliated against, in addition to being denied an investigation, a fair hearing process and so on.

The amended complaint, like the pleadings in plaintiff's other actions, contains several general references to the First and Fourteenth Amendments. Liberally construed, the amended complaint alleges violations of plaintiff's First Amendment right to free speech and his substantive due process rights. The amended complaint prays for damages and injunctive relief, namely that the District Board of Trustees be directed to "establish a meaningful enforcement mechanism for it's [sic] policy and regulations that proscribe a

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[4] The pages of the amended complaint are not numbered. This citation refers to the sixth and seventh pages of the amended complaint, with the first page being the cover page. The undersigned cites to other pages of the amended complaint herein in a similar fashion.

retaliatory act being taken against an employee who reports an act of unlawful discrimination." (Id. at 14.)

As an initial matter, it must be noted that plaintiff's amended complaint is unfocussed, full of conclusory allegations and difficult to decipher. It does not contain "a short and plain statement" of a claim showing that plaintiff is entitled to relief. See Fed. R. Civ. P. 8(a)(2). This alone warrants dismissal. See Jones v. Cmty. Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984). Nonetheless, even considering the merits of plaintiff's claims, the undersigned concludes that this entire action should be dismissed with prejudice as to all named defendants for failure to state a cognizable claim.

More specifically, the undersigned will recommend the motion to dismiss be granted because the moving defendants are entitled to qualified immunity. Whether a defendant is entitled to qualified immunity involves a two-step inquiry. Saucier v. Katz, 533 U.S. 194, 200 (2001). The first step is to ask whether the alleged facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right. Saucier, 533 U.S. at 201. If this question is answered in the negative, then "there is no necessity for further inquiries concerning qualified immunity." Id. If the question is answered in the affirmative, the next step is "to ask whether the right was clearly established." Id. A constitutional right is clearly established when "it would be clear to a reasonable officer that his

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conduct was unlawful in the situation he confronted." Id. at 202. See also Billington v. Smith, 292 F.3d 1177, 1183-84 (9th Cir. 2002).

With respect to plaintiff's attempt to state claims based upon the First Amendment, the alleged facts do not demonstrate that defendants' conduct violated plaintiff's right to free speech. This is because the allegations of the amended complaint indicate that plaintiff's speech as a public employee does not amount to speech upon "a matter of public concern." See Connick v. Myers, 461 U.S. 138, 143-46 (1983); Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Ceballos v. Garcetti, 361 F.3d 1168, 1173 (9th Cir. 2004). Rather, the alleged speech encompassed by the amended complaint is simply part of a larger, ongoing internal dispute between plaintiff and the District and its employees regarding administrative matters within the District. More specifically, central to this lawsuit is plaintiff's complaint that defendants distributed a letter inviting the parents of students to contact the school directly, rather than plaintiff, should they have any concerns about their children and/or plaintiff. Plaintiff obviously has taken exception to this perceived end-around to his contact with the parents of students and attempts to blame it on his discussion of the alleged slapping incident. However, the allegations of the amended complaint as whole, as well as the content of the documents on file in plaintiff's other actions, belie plaintiff's contention in this regard. Plaintiff's concern with defendants obviously amounts to an individual personnel dispute that clearly is "of no relevance to the public's evaluation of the performance of" the District. See

Ceballos, 361 F.3d at 1173. See also Coszalter v. City of Salem, 320 F.3d 968, 973-74 (9th Cir. 2003) ("[S]peech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern'"). Accordingly, accepting the allegations of the amended complaint as true, the court finds that plaintiff's speech did not regard a matter of public concern and defendants did not violate plaintiff's First Amendment rights.

Even assuming plaintiff has spoken upon a matter of public concern, as opposed to a matter only of personal interest, the court further finds that the District's interest as an employer in promoting efficiency of the public services it performs through its employees outweighs plaintiff's interest in that speech. See Pickering, 391 U.S. at 568; Gillbrook v. City of Westminster, 177 F.3d 839, 867 (9th Cir. 1999). In weighing whether the government's interest in promoting an effective workplace outweighs an employee's First Amendment rights, courts may consider "whether the speech (i) impairs discipline or control by superiors, (ii) disrupts co-worker relations, (iii) erodes a close working relationship premised on personal loyalty and confidentiality, (iv) interferes with the speaker's performance of her or his duties, or (v) obstructs the routine operation of the office." Hyland v. Wonder, 972 F.2d 1129, 1139 (9th Cir. 1992)(citations omitted). Here, the District's interest in maintaining discipline and control in its schools, communicating with parents, promoting co-worker relations and

fostering an educational environment outweighs plaintiff's interest in spreading information to co-workers regarding the alleged slapping incident. See Goss v. Lopez, 419 U.S. 565, 589-90 (1975)(Powell, J., dissenting); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 507 (1969)("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."). For this reason as well, the undersigned finds that plaintiff's speech as alleged in the amended complaint is not protected by the First Amendment.

Accordingly, defendants are entitled to qualified immunity on plaintiff's First Amendment claims. The undersigned therefore will recommend that defendants' motion to dismiss be granted.

Plaintiff's substantive due process claims also must be dismissed. As set forth above, the allegations of the amended complaint, like the allegations in plaintiff's other actions, boil down to the assertion that plaintiff is being retaliated against for speaking out against perceived inequities within District schools. As such, plaintiff's claims must be addressed under the First Amendment, not substantive due process. This is because "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting

Graham v. Connor, 490 U.S. 386, 395 (1989)). As discussed above, the moving defendants are entitled to qualified immunity on plaintiff's First Amendment claims. Therefore, defendants' motion to dismiss must be granted with respect to plaintiff's substantive due process claims as well.

It also remains clear that plaintiff is attempting to hold the Board of Trustees defendants liable for the actions of others under a respondeat superior theory of liability. However, defendants are not liable for the actions of District employees under such a theory. More specifically, supervisory personnel generally are not liable under 42 U.S.C. § 1983 for the actions of their employees under a theory of respondeat superior and, therefore, when a named defendant holds a supervisory position the causal link between the defendant and the claimed constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). "A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)(citing Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984)). Vague and conclusory allegations such as those set forth in the amended complaint concerning the involvement of official personnel in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982). The undersigned noted this deficiency the order issued April 15, 2005, dismissing

plaintiff's complaint with leave to amend. Plaintiff has failed to cure that deficiency in his amended complaint. For this reason as well, the motion to dismiss must be granted.

Finally, in the earlier order dismissing plaintiff's complaint with leave to amend, the undersigned also observed that plaintiff had failed to allege facts sufficient to establish municipal liability arising from any policy of the Board of Trustees. See Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978). Again, plaintiff has failed to cure the noted deficiency. In this regard, the amended complaint contains insufficient allegations regarding any policy or custom of the Board of Trustees resulting in a deprivation of constitutional rights; any decision by an official with final policy-making authority which resulted in a violation of plaintiff's rights; or any such official's ratification of an unconstitutional decision by a subordinate. See Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992).

For all of the reasons set forth above, plaintiff's amended complaint is fatally deficient. Moreover, the arguments presented by plaintiff in the motions brought before the court in this and his other cases are frivolous. Finally, whatever his intentions, through the numerous lawsuits filed in this court involving essentially the same subject or plaintiff's displeasure with the results obtained in prior litigation with respect thereto, plaintiff has engaged in conduct that has harassed the named defendants. For all these reasons, it appears clear that plaintiff cannot cure the defects in his amended complaint. Granting leave to amend under these

circumstances would be futile. See Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987); see also Lopez v. Smith, 203 F.3d 1122, 1127 n.8 (9th Cir. 2000) ("When a case may be classified as frivolous or malicious, there is, by definition, no merit to the underlying action and so no reason to grant leave to amend.") Accordingly, the undersigned will recommend that this action be dismissed with prejudice.

II. Plaintiff's Motion for Summary Judgment

Having determined that the amended complaint fails to state a claim upon which relief may be granted, the undersigned will recommend that plaintiff's motion for summary judgment be denied.

CONCLUSION

For the reasons set forth above, IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to dismiss (Doc. no. 16) be granted;

2. Plaintiff's motion for summary judgment (Doc. no. 18) be denied; and

3. Plaintiff's amended complaint be dismissed with prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's

Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 16, 2005.

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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